IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Appellee,

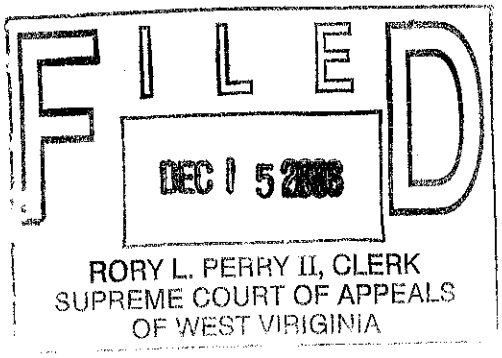
v.

ERIC DELBERT JETT,
Appellant.

Supreme Court No. 33198

Circuit Court No. 04-F-380
(Kanawha)

APPELLANT'S BRIEF



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I.

PROCEEDINGS AND RULINGS BELOW

Eric Jett's theory of defense at trial was that he did not operate or attempt to operate a clandestine drug lab at his home. Defense counsel prepared and proffered an instruction that supported this theory of defense. It was an accurate statement of W.Va. Code § 60a-4-411 (2003), the clandestine drug lab statute, and it also defined "attempt."

Attempt was not only an essential element in the State's case against Eric, it is also a "word of art." The trial court's providing the jury with the legal definition of attempt was crucial to the fact-finding process in Eric's case for several reasons. It was important to Eric's sole defense at trial that he did not operate or attempt to operate a clandestine drug lab at his home. Without a proper understanding of the legal definition of attempt the jury could not give Eric's defense the full effect it deserved nor could the jurors hold the state to the burden of proving every essential element beyond a reasonable doubt.

The trial court refused to include defendant's proffered instruction in the charge to the jury. (Tr. Vol. III 406) Defense counsel objected and proffered reasons why Eric was entitled to the proposed instruction. (Tr. Vol. III 408). The trial court instructed the jury solely on the elements of W.Va. Code § 60a-4-411 (2003) with no elaboration on the legal meaning of "attempt." (Tr. Vol. IV 427-28)

On January 27, 2005, Eric was convicted by the jury of operating or attempting to operate a clandestine drug lab. Eric was sentenced to an indeterminate term of two to ten years in the penitentiary by the trial court on March 14, 2005.

II.

STATEMENT OF FACTS

At the close of Eric's trial, defense counsel proffered an instruction for the trial court to include in the charge to the jury. The instruction reflected counsel's theory of defense at trial that, Eric did not operate or attempt to operate a clandestine drug lab at his home. Defense Counsel's instruction followed the letter of W.Va. Code § 60a-4-411(2003) and defined attempt as stated by this Court in *Syl. Pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).* The definition of attempt was a correct statement of the law, it was not covered in the trial courts charge, and it was crucial that the jury understand the legal meaning of attempt to properly apply the facts to the law in Eric's case.

Citing Franklin Cleckley's Handbook on West Virginia Criminal Procedure, defense counsel argued that upon the request of the defendant, the trial court should define attempt to the jury because it was an element of the offense and a "word of art." (Tr. Vol. III 408) The prosecutor objected to defense counsel's instruction arguing that it went well beyond the scope of the statute. (Tr. Vol. III 410) The trial court refused to give counsel's instruction or to incorporate the language into the charge. (Tr. Vol. III 406) Defense counsel objected and made a proffer explaining why the instruction was important to Eric's case. (Tr. Vol. III 408)

Counsel quoted Cleckley to the trial court: " the elements of some offenses contain words or phrases which have special meaning or connotation. These words are known as words of art. These words of art are of such uncommon usage and understanding that upon request they should be instructed upon in order that a jury may

be properly instructed when they are contained in the elements of the offense..... Cleckley goes on to say that when in doubt as to whether a definition of a term should be given, upon request it should be given." *Franklin D. Cleckley, Instructions to the Jury, in Handbook on West Virginia Criminal Procedure Volume Two 232 (1985)* (Tr. Vol. III 408- 409) Counsel explained his concern was the way the elements were listed in the trial court's proposed instruction was misleading. The court's instruction allowed the jury to believe the mere assembly of chemicals and equipment on real or personal property was enough to support a conviction of operating or attempting to operate a clandestine drug lab under W.Va. Code § 60a-4-411(2003), and that was not what the legislature had intended. (Tr. Vol. III 411) Counsel argued that it was the trial court's responsibility to interpret the statute and deliver a charge which the jury would be able to understand and not be confused by. (Tr. Vol. III 409) Counsel further argued that the state had failed to produce any evidence that proved Eric attempted to operate a clandestine drug lab. (Tr. Vol. III 405)

The prosecutor objected to defense counsel's proffered instruction, including the definition of attempt. In addressing the defendant's proffered instruction, the prosecutor argued, "I think that the language in the defendant's instruction would do nothing but hamper and confuse the jury's deliberations. I think it goes way beyond the scope of the statute." (Tr. Vol. III 410) The prosecutor stated that the instruction found within the trial court's charge was very clear and it was up to the jury to decide whether Eric operated or attempted to operate a clandestine drug lab. (Tr. Vol. III 410)

The trial court refused defense counsel's instruction and refused to incorporate the portions of the instruction that defined the requirements of operate and attempt. (Tr. Vol.

III 406) In ruling that it was not going to incorporate the defendant's instruction or give it separately the trial court stated, "But I still believe the Court cannot take it upon itself to interpret the law as the legislature has written. And if there's an issue with the statute, then the Supreme Court can do something about that too. But right now, I think my charge that I proposed correctly states the law of this case and I think that the facts that have been before this jury, evidence that has been adduced at this trial supports the giving of this instruction." (Tr. Vol. III 412) The charge the trial court gave included a bare listing of the elements of W.Va. Code § 60a-4-411(2003). The instruction allowed the jury to believe the mere assembly of chemicals and equipment on real or personal property was enough to support a conviction of operating or attempting to operate a clandestine drug lab under W.Va. Code § 60a-4-411 (2003). Defense counsel explained this to the trial court several times in an attempt to get the court to incorporate his instruction in the charge but the trial court refused to change it's instruction. (Tr. Vol. III 408-412)

Counsel was able to present a considerable amount of evidence in support of Eric's defense at trial. Eric was incarcerated out of state at the time that his home was searched and charges were filed against him. (Tr. Vol. III 365) Other people besides Eric had access to the basement portion of his home. (Tr. Vol. III 372) Also, the testimony of Detective Gilbert, one of the investigating officers, further established that the State's case rested on the attempt to operate portion of the statute.

Detective Gilbert testified that the evidence recovered at Eric's home was not an operational lab when seized. Detective Gilbert verified that officers did not recover a heat source at Eric's home, which he agreed is a necessary piece of equipment to operate

a clandestine drug lab. Gilbert also testified that officers did not recover any controlled substance in the evidence seized at Eric's home. (Tr. Vol. III 274). The prosecutor also confirmed this by verifying all of the samples submitted to the West Virginia State Police Crime Lab from Eric's home came back negative for controlled substances. (Tr. Vol. III 291) The trial court's giving the legal definition of attempt to the jury was a necessity to ensure they could properly apply the law to the facts of Eric's case.

III.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION DEFINING ATTEMPT, A TERM OF ART, WHICH WAS AN ESSENTIAL ELEMENT OF THE STATE'S CASE, THEREBY EFFECTIVELY DENYING JETT DUE PROCESS OF LAW

IV.

DISCUSSION OF LAW

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION DEFINING ATTEMPT, A TERM OF ART, WHICH WAS AN ESSENTIAL ELEMENT OF THE STATE'S CASE, THEREBY EFFECTIVELY DENYING JETT DUE PROCESS OF LAW

This Court has continuously held that the ultimate responsibility of ensuring that a jury is clearly and properly instructed as to the law rests with the trial court. *State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31, 34 (1984); State v. Dozier, 163 W.Va. 192, 255 S.E.2d 552 (1979); State v. Riley, 151 W.Va. 364, 151 S.E.2d 308 (1966), overruled on other grounds by Proudfoot v. Dan's Marine Service, 210 W.Va. 498, 558 S.E.2d 298*

(2001). The trial court also holds the responsibility of instructing the jury on all of the essential elements of an offense and failure to do so denies the defendant due process of law and constitutes reversible error. *Syllabus, State v. Miller 184 W.Va. 367, 400 S.E.2d 611(1990).* The trial court's refusal to define attempt was a failure to instruct on all the essential elements of the charges Eric Jett faced. Without the proper definition of attempt, the jury could not properly hold the state to it's burden of proving every essential element beyond a reasonable doubt in Eric's case.

In Syllabus Point Four of *State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995),* this Court stated:

> "A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. ..."

"The purpose of instructing the jury is to focus its attention on the essential issues of the case and to inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make." *Id.* at. *672, at 178.* "Without instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." *State v. Miller, 194 W.Va. 3, 15, 459 S.E. 2d 114, 126 n. 20* (1995). Defense counsel explained to the trial court that the instruction the court included in the charge was misleading. Counsel explained why it was misleading. The trial court refused to change the instruction holding that its instruction was proper. The question of whether a jury was properly and adequately instructed is a question of law and is reviewed de novo by this court. *Syllabus Point 1 State v. Hinkle 200 W.Va. 280, 489 S.E.2d 257 (1996).*

" A criminal defendant is entitled to an instruction on the theory of his or her defense if he or she has offered a basis in evidence for the instruction, and the instruction has support in the law." *State v. Hinkle 200 W.Va. at 285,489 S.E.2d at 262 citing State v. LaRock, 196 W.Va. 294,308, 470 S.E.2d 613, 627 (1996).* A trial court's refusal to give a requested instruction is reversible error if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that failure to give it seriously impairs a defendant's ability to effectively present a given defense. *State v. Derr, 192 W.Va. 165,180 451 S.E.2d 731, 746 (1994).* In *Hinkle*, this Court held that it was an abuse of discretion for a trial court to refuse an instruction that meets all of the criteria set out in *Derr. Hinkle 200 W.Va. at 285, 489 S.E.2d at 262.*

In the case at bar, defense counsel submitted an instruction that met all of the requirements set out by this Court in *Derr*. The instruction was a correct statement of the law, it followed the letter of W.Va. Code § 60a-4-411 (2003), it was not substantively covered in the court's charge to the jury, and it covered an important point in the trial that was central to Eric being able to effectively present a defense. Eric's theory of defense at trial was that he did not operate or attempt to operate the drug lab at 350 Elk River Road. This instruction was necessary to further that defense. It included this Court's definition of attempt as stated in *Syl. Pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).* Defense Counsel's proposed instruction stated:

> "The offense charged in this indictment is the operation or attempted operation of a clandestine drug laboratory. A "clandestine drug laboratory" means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine.
>
> The State must prove beyond a reasonable doubt that the defendant operated or

attempted to operate a clandestine drug laboratory. You are instructed that the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of operation of a clandestine drug laboratory. If you find that the Defendant merely possessed or assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, you must find the Defendant not guilty.

Likewise, the mere assembly of any chemicals or equipment for the purpose of manufacturing methamphetamine does not constitute the crime of attempt to operate a clandestine drug laboratory. In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.

You are instructed that if you find the Defendant assembled chemicals or equipment or a combination thereof on or in any property, real or personal, for the purpose of manufacturing methamphetamine, but that the Defendant committed no overt act in the manufacturing process itself, you must find the Defendant not guilty.

1 W.Va.Code, 60A-4-411

2 Syl. Pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994). *See also,* Syl. Pt. 2, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), *overruled on other grounds,* State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)."

(Tr. Vol. III 407-408)

The trial court refused to include defendant's proffered instruction in the charge to the jury or to incorporate the language within it's instruction. (Tr. Vol. III 406) By refusing to instruct on the meaning of "attempt," the trial court failed to properly inform the jury of an important point in the trial. This was an abuse of discretion by the trial court. The word "attempt" has a much more complex meaning in the legal system than it holds in everyday life.

Defendant's proposed instruction would have assisted the jury in understanding the meaning of "attempt", an essential element in the state's case and a "word of art" in the legal system. Franklin Cleckley addressed "words of art" in his Handbook on West Virginia Criminal Procedure; in it he stated, " Elements of some offenses contain words

or phrases which have some special meaning or connotation. These are known as "words of art." These words of art are of such uncommon usage and understanding that **upon request they should be instructed upon in order that a jury may be properly instructed when they are contained within the elements of the offense**. ..... When the trial judge is in doubt as to whether a definition of a term should be given, upon request he should give it. " *Cleckley Supra (Emphasis added)*

"Attempt" was a substantive issue in the trial, as W.Va. Code § 60a-4-411 (2003) required proof of "operation or the attempt to operate a clandestine drug lab." More importantly, in the case at bar the State's case rested on the attempt to operate portion of the statute. When Eric's house was searched and the evidence was seized, officers did not recover an operational lab. Detective Gilbert, a witness for the State, testified that the clandestine lab, which was the basis of the charges against Eric, was not an operational lab the day that it was seized. Detective Gilbert did testify that the lab had the potential to be operational but when they found it, it was not operational. Detective Gilbert explained there was no heat source found at the site, which he testified is a necessary piece of equipment to operate a clandestine drug lab. Furthermore, officers did not recover any methamphetamine at the site. (Tr. Vol III at 274-75). The prosecutor confirmed that no controlled substance was found in any of the samples taken from Jett's home during the analysis at the West Virginia State Police Crime Lab. (Tr. Vol. III 291)

"Attempt" was not substantially covered in the trial court's charge to the jury. The only instruction the trial court gave regarding attempt was the instruction listing the elements of the offense. The instruction listed "attempt" but failed to give a legal definition of "attempt." The instruction also failed to substantially instruct the jury that

the mere assembly of ingredients and equipment is not enough to support a conviction for operating or attempting to operate a clandestine drug lab. The court's instruction stated:

> "Before ERIC DELBERT JETT, can be found guilty of the offense of operating or attempting to operate a clandestine drug laboratory as contained in the indictment in this case, the state must overcome his presumption of innocence and prove to your satisfaction beyond a reasonable doubt that:
> 1. ERIC DELBERT JETT,
> 2. In Kanawha County, West Virginia,
> 3. on or about the 23rd day of June, 2004
> 4. did operate or attempt to operate
> 5. a clandestine drug laboratory
> 6. in which he did assemble
> 7. chemicals or equipment or a combination thereof
> 8. in or on any real or personal property
> 9. for the purpose of manufacturing methamphetamine
>
> If after impartially considering all the evidence in this case, each member of the jury is convinced beyond a reasonable doubt of each of these elements of operating or attempting to operate a clandestine drug laboratory, then you must find the defendant guilty of operating or attempting to operate a clandestine drug laboratory. If you have reasonable doubt as to any one or more of these elements of operating or attempting to operate a clandestine drug laboratory, then you cannot return a verdict of guilty of operating or attempting to operate a clandestine drug laboratory, and you must find a verdict of not guilty." (Tr. Vol. IV 427-28)

W.Va. Code § 60a-4-411 (2003), as written, requires "operation or the attempt to operate," in order for a defendant to be convicted under the statute. The instruction given by the trial court had the potential to mislead the jury by allowing them to think that the mere assembly of chemicals and equipment on real or personal property for the purpose of manufacturing methamphetamine, in other words simply proving that a clandestine drug lab existed, was enough for a conviction. Further explanation of "operate" and "attempt," the words of art found within the instruction, would have helped to avoid confusion and ensure that the conviction was based on the letter of the law as written. The trial court failed to meet its responsibility to properly instruct the jury, and it is likely

the jury was misled. The failure by the trial court to properly instruct the jury was very prejudicial to Eric and skewed the fact-finding process in his trial.

The jury in Jett's case was left to draw legal conclusions without the appropriate guidance from the trial court. The instruction as given by the trial court had the potential to mislead the jury as to what is sufficient to support a conviction under W.Va. Code § 60a-4-411. Defense counsel presented the court with an instruction that followed the letter of the statute, gave a correct statement of the requirements necessary to prove operation and the legal definition of attempt and it was supported by case law.

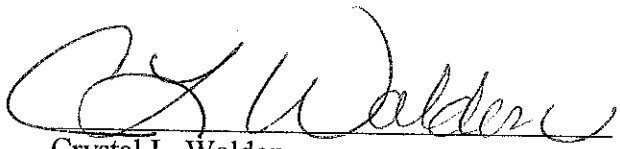
This instruction was necessary not only to help Eric effectively present a defense but also for the jury to properly understand and correctly determine Eric's guilt or innocence. Refusing to give defense counsel's instruction was clearly an abuse of discretion by the trial court. The trial court denied Eric his rights to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and Article III, Section 10 of the West Virginia Constitution by failing to properly instruct the jury in his case.

RELIEF REQUESTED

For the reasons stated with reference to assignment of error I, Eric Jett requests this Court reverse his conviction and remand his case for a new trial.

Respectfully submitted,

ERIC JETT
By Counsel



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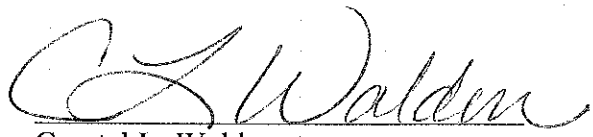
CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 15th day of December, 2007, I sent via United States Postal Service a copy of the foregoing Appellant's Brief to Dawn Warfield, Deputy Attorney General, State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.



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